University of Baltimore Law Review

Volume 2
Issue 1 *Winter 1972*

Article 7

1992

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THE NEED FOR PRIOR RESTRAINT IN THE SCHOOLS:

A Model Rule

INTRODUCTION

In 1969 the Supreme Court in *Tinker v. Des Moines Independent Community School District*[1] extended the freedom of symbolic expression to the high school student within the school environment, as long as the student ". . .neither interrupted school activities nor sought to intrude in the school affairs or the lives of others."[2] Unfortunately, the Court presented a decision which the judiciary of the land has abused and misused. Where *Tinker* dealt with political symbolism, other student cases were concerned with student expression of an entirely different nature.[3] How can the wearing of a pantsuit in violation of a dress code and participation in a demonstration,[4] the flaunting of school rules and regulations,[5] the right to choose speakers,[6] and the writing of underground newspapers[7] be so quickly compared and considered the same as political symbolic expression? (i.e., "political" meaning governmental activities and policies).

Through the use of *Tinker*, many courts have been able either to support or to defeat a school's attempt to curtail student activity. The number of cases involving constitutional rights at school is so voluminous that it would be impossible to attempt to digest them, much less reconcile them.[8] "Indeed, the welter of such cases in which a vociferous child runs right from the schoolhouse door to the courthouse door with his literature in hand has grown in recent years beyond all proper proportion."[9] The Supreme Court has denied *certiorari* to ". . . several controversial federal court of appeals decisions dealing with student conduct and discipline."[10]

Prior to the 1960's, American students seldom appeared in the courts demanding their individual rights: the school's *in loco parentis*

1. 393 U.S. 503 (1969)
2. *Id.* at 514.
3. Haskell, *Student Expression in the Public Schools: Tinker Distinguished*, 59 GEO. L. J. 37, 40 (1970).
4. Press v. Pasadena Independent School Dist., 326 F. Supp. 550 (S.D. Tex. 1971).
5. Graham v. Houston Independent School Dist., 335 F. Supp. 1164 (S.D. Tex. 1970).
6. Brooks v. Auburn Univ., 412 F.2d 1171 (5th Cir. 1969).
7. Baker v. Downey City Board of Educ., 307 F. Supp. 517 (C.D. Cal. 1969); Sullivan v. Houston Independent School Dist., 307 F. Supp. 1328 (S.D. Tex. 1969); Scoville v. Board of Educ., 425 F.2d 10 (7th Cir. 1970), *cert. denied*, 400 U.S. 826 (1970); Eisner v. Stamford Board of Educ., 440 F.2d 803 (2d Cir. 1971); Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971); Riseman v. School Comm., 439 F.2d 148 (1st Cir. 1971).
8. Baughman v. Freienmuth, 343 F. Supp. 487 (D. Md. 1972).
9. *Id.*
10. Haskell, *supra* note 3, at 39.

authority[11] was an accepted practice. The cases that did appear were limited to religion,[12] learning of foreign languages,[13] racial segregation,[14] and patriotism in the schools.[15] The mushrooming of students' demands to be heard—"to do their own thing"—became apparent with the coming of the '60's. The post-war babies had become high school students, existing in a world with the constant mutual terror of the cold war and ever-present threat of atomic warfare. The students' previous preoccupation with panty raids and prom queens had changed to marches for peace and sit-ins for equal rights. The threats and pressures of daily life had developed a population of young students who wished to be treated equitably and to be accorded the right to speak out against those aspects of life that threatened their very existence or contravened their moral concepts.

Since forty percent of the high school student's waking hours is spent within the confines of a public school building,[16] it is not surprising that the young student felt compelled to express his discontent and disappointment on school grounds. School districts throughout the country have attempted to promulgate rules which would allow the student his constitutional right of free expression, while at the same time preserve decorum within the school. For various reasons courts have held many of the rules by school boards unconstitutional as violating freedom of speech under the first and fourteenth amendments.[17] It is the purpose of this comment to establish a model rule. This rule will be based on a review and analysis of the relevant cases and will present definite guidelines to strike a balance between student's rights and the school's need for orderly administration of its pupils' conduct.

THE HIGH SCHOOL STUDENT v. THE ADULT

In 1969 a federal district court held that "[s]tudents are persons under the Constitution; they have the same rights and enjoy the same privileges as adults."[18] But is this really the status of the high school

11. For a complete discussion on the *loco parentis* position of the schools, see Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373 (1969).
12. McCollum v. Board of Educ., 333 U.S. 203 (1948) (released time for religious training).
13. Meyer v. Nebraska, 262 U.S. 390 (1923) (teaching of German).
14. Brown v. Board of Educ., 347 U.S. 483 (1954); United States v. Jefferson County Bd. of Educ., 373 F.2d 836 (5th Cir. 1966).
15. Board of Educ. v. Barnette, 319 U.S. 624 (1943) (saluting the flag in school).
16. Private schools are not controlled by the fourteenth amendment. *See* Powe v. Miles, 407 F.2d (2d Cir. 1968).
17. Baughman v. Freienmuth, 343 F. Supp. 487 (D. Md. 1972) (too broad); Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971) (lack of criteria to be followed by school authorities); Sullivan v. Houston Independent School Dist., 307 F. Supp. 1328 (S.D. Tex. 1969) (this case did not meet minimal standards of procedural due process of law).
18. Miller v. Gillis, 315 F. Supp. 94, 99 (N.D., Ill. 1969).

student? Is he generally regarded by the judiciary and Congress as a mature individual, eligible to accept the responsibilities of citizenship? Justice Stewart, in his concurring opinion in *Tinker*, said that, ". . .First Amendment rights of children are [not] co-extensive with those of adults."[19] In *Schwartz v. Schuker*[20] the court ruled that "[high school students are] in a much more adolescent and immature stage of life and less able to screen fact from propaganda."[21] In case after case dealing with the constitutional rights of the high school student, we are continuously reminded that a student, below the age of eighteen, is naive and impressionable; he is in need of guidance and restriction.

The laws show that the child under eighteen is definitely a subordinated individual. Two significant laws apply to the eighteen year old. The first of these bestows upon the young person the responsibility of serving his country through military service.[22] The second is the twenty-sixth amendment to the Constitution, entitling eighteen year-olds to vote. The states have distinguished eighteen years as the age when the child becomes an adult. In thirty-two states, delinquent youngsters are within the jurisdiction of the juvenile court until their eighteenth birthday. More than twenty-five states do not permit an unconditional driver's license until eighteen. Twenty-seven states prohibit youngsters below the age of eighteen to work without permits.[23] Thus we see that society has clearly established a different standard of societal control of persons under eighteen: below eighteen, individuals are subject to more stringent restrictions than are necessary for adults.

THE NEED FOR REGULATIONS

Education is not just the formal study of traditional subjects; the school must also help to prepare the student for citizenship. The

19. 393 U.S. at 515 (concurring opinion); first stated by Justice Stewart in Ginsberg v. New York, 390 U.S. 629, 649–50 (1968).
20. 298 F. Supp. 238 (E.D.N.Y. 1969).
21. *Id.* at 242.
22. Selective Service Act of 1967, 50 U.S.C. § 454 (1970).
    § 454. Persons liable for training and service.
    (a) Age limits; training in National Security Training Corps; physical and mental fitness; adequate training facilities; assignment to stations and units; training period; medical specialist categories.
    Except as otherwise provided in this title [sections 451, 453, 454, 455, 456, and 458–71 of this Appendix], every male citizen of the United States and every male alien admitted for permanent residence, who is between the ages of 18 years and 6 months and 26 years, at the time fixed for his registration, or who attains the age of 18 years and 6 months after having been required to register pursuant to section 3 of this title [section 453 of this Appendix], or who is otherwise liable as provided in section 6(h) of this title [section 456(h) of this Appendix], shall be liable for training and service in the Armed Forces of the United States . . . .
23. For a state-by-state analysis, see *Age at Which a Child Attains Adult Status*, READER'S DIGEST 1972 ALMANAC AND YEARBOOK, at 290–91, (N.Y. 1972).

"informal" aspect of the high school's curriculum must allow the student to develop his mind, and to be able to question, analyze, and think as a mature individual. Creativity and open discussion of politics and culture must not be prohibited because of rigorous regulations. Rules are necessary to maintain an orderly educational center, but these rules must be reasonable and not overbearing. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[24]

The Supreme Court has continuously been concerned with the problem of balancing the authority of school officials with the fundamental safeguards of the Constitution.[25] The courts have shown freedom of speech is not without limit and not absolute under all circumstances.[26] However, in order to have a healthy diversity of opinion among students, a rule must not prohibit the student's right to speak. Where else, if not in the school, should there be the right to discuss issues openly and express opinions freely? By denying the student his right to express himself, the school may be hampering the student's quest for further knowledge. A rule formulated by the school must strike a balance between the pursuits of a creative, thinking mind and the preservation of orderliness. The Supreme Court in *Terminiello v. Chicago*[27] said:

> [A] function of free speech . . . is to invite dispute. It may . . . serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. . . . *That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest* [Citing cases]. There is no room . . . for a more restrictive view. For the alternative would lead to standardization of ideas . . . .[28] (emphasis added).

By contrast in 1968 the 5th Circuit recognized the need for order. Unlike *Terminiello* where the first amendment claim was more

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24. Shelton v. Tucker, 364 U.S. 479, 487 (1960).
25. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).
26. States may ban the use of so-called "fighting words," epithets of personal abuse which, when addressed to men of common intelligence, would be words likely to cause the average citizen to fight. *See* Cohen v. California, 403 U.S. 15 (1971); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). Although the first amendment protects non-verbal communication, conduct is not guaranteed the same amount of protection as pure speech. "[C]ertain public conduct is subject to regulation even though it is related to expression." Joyce v. United States, 454 F.2d 971, 988 (D.C. Cir. 1971), *cert. denied*, 92 S.Ct. 1188 (1972).
27. 337 U.S. 1 (1949).
28. *Id.* at 4.

prominent, the court upheld a principal's right to prescribe the length of a student's hair, ruling that this prescription was not in violation of free speech:

> The interest of the state in maintaining an effective and efficient school system is of paramount importance. That which so interferes or hinders the state in providing the best education possible for its people, must be eliminated or circumscribed as needed.[29]

SCHOOL RULES AND WHY THEY HAVE FAILED

In an attempt to develop a firm and valid rule for the school districts to follow, it is necessary to consider the various rules that have been developed and why, through the judicial process, they have failed. Although *Tinker* does not apply to the underground press or to speech as one normally thinks of speech, it is important to mention the failure of the rule that was there involved, because nearly every case dealing with student rights seems to base its primary argument on the language of *Tinker*.

The Supreme Court there held that if it could not be shown that students' activities would materially and substantially disrupt the work and discipline of the school the prohibition could not be sustained.[30] In *Tinker*, the wearing of a black (symbolic) armband was singled out for regulation. The school officials had made such a regulation only days before in anticipation of trouble: ". . .any student wearing an armband to school [will] be asked to remove it, and if he [refuses] he [will] be suspended until he [returns] without the armband."[31] The Supreme Court held that ". . .undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[32] The Court established in *Tinker* a test for all schools to apply when dealing with the problem of balancing individual rights with the management of the school:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere

29. Ferrell v. Dallas Independent School Dist., 392 F.2d 697, 703 (5th Cir.), *cert. denied*, 393 U.S. 856 (1968).
30. 393 U.S. at 513.
31. *Id.* at 504.
32. *Id.* at 508.

> with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.[33]

It is interesting to note that the American Civil Liberties Union expands on the *Tinker* rule by making it somewhat more specific:

> Neither the faculty advisors nor the principal should prohibit the publication or distribution of material except when such publication or distribution would clearly endanger the health or safety of the students, or *clearly* and imminently threaten to disrupt the educational process, or might be of a libelous nature . . . .[34] (emphasis added)

The School regulation in *Tinker* was judged invalid; the educational environment was in no way disturbed by the outlawed activity. In trying to develop a rule for all school districts, a definite problem exists: what may be the needs and problems in one locale may have absolutely no validity or significance in another (*e.g.*, rules prohibiting an activity in a New York City school may have no bearing on a midwest farmland school). As an example of this, consider the case of *Guzick v. Drebus.*[35] As in *Tinker*, the school in *Guzick* had an unwritten regulation commonly understood to state that students would not be permitted to wear emblems, buttons, or other insignia on school property during school activity. Two boys were suspended from school for wearing anti-war buttons. Where *Tinker* found no evidence of school disturbance, *Guzick* found that the rule was an old and necessary restriction since the racial situation there was potentially explosive. If the students' activity had been permitted, the court felt that it would be disruptive to the decorum of the school. The rule was upheld and the activity prohibited.

The court in *Guzick* carefully distinguished *Tinker* as a case of invidious discrimination: viz., *black* arm bands; if the discrimination were eliminated (*i.e. all* insignia), the rules were justifiable. The case further explained *Tinker*, and the Supreme Court denied *certiorari*. The prohibition in *Guzick* was an overall condemnation, a blanket provision, encompassing *all* symbolic buttons or insignia. The Court may have considered that the universality of the subject matter and enforcement of the rule in *Guzick* overcame the invidious discrimination in the *Tinker* case, and served as further clarification of *Tinker*.[36]

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33. *Id.* at 509.
34. American Civil Liberties Union, *Academic Freedom in the Secondary Schools* 11–12 (Sept. 1968).
35. 305 F. Supp. 472 (N.D. Ohio 1969), *aff'd*, 431 F.2d 594 (6th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971).
36. The writer cannot accept this reasoning. A universal or indiscriminate rule may eventually assist in eradicating the basic right and add in the erosion of the basic freedoms. Rules are necessary, but they must not be arbitrarily restrictive. Guidelines to protect

In 1969 a district court in New York took a different tack when, in *Schwartz v. Schuker*,[37] they did not even consider the validity of the claims of the plaintiff that the rule involved was unconstitutional. Jeffrey Schwartz, a student at Jamaica High School, was asked to stop distributing unsponsored newspapers on school grounds. The school officials claimed that he was violating a school rule that required students to seek permission before distributing written material. Nine months later Jeffrey was once again apprehended for distributing papers. When he refused to surrender his unofficial papers, he was dismissed from school. Although Jeffrey was not officially readmitted to school, a few weeks later he attended classes. The court ruled that gross disrespect of administrators and rules of a school is sufficient reason for suspension and expulsion; order on school grounds was far more important than the constitutional issues that the student tried to raise. The court stressed that respect and obedience are what is important when dealing with students.

In conjunction with this case is *Graham v. Houston Independent School District*.[38] Here, the students knew that there was a rule (that permission was required prior to distributing written material), but obviously the students were purposely flaunting the regulation. If the students, by flaunting the regulation, were attempting to put the rule to a test, they did not succeed; the court never considered the validity of the rule, they considered only the fact that the students were deliberately flaunting authority. "This court cannot agree . . . that any activity involving speech, even when coupled with gross disobedience of school disciplinarians, must be tested against the disruption standard."[39]

Interestingly enough, and in contrast, the judiciary would not consider the issue of gross disobedience of misconduct in *Scoville v. Board of Education of Joliet Township High School District 204, County of Will, Illinois*.[40] The students had published "Grass High," brought it to school and sold it to sixty people for fifteen cents each. The paper consisted of essays, poetry, reviews, and editorials. The problem arose over the editorial which criticized the school administration by making an offensive, though not libelous, statement. The students were dismissed from school and applied to the court for relief. The school, in suspending the pupils, had applied an Illinois statute

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one's rights must be incorporated when dealing with restricting one's rights. *See* Conclusion, *infra*.

In short, the writer feels that although the rule was upheld as valid it should have failed. The rule was overly broad. The prohibition of *all* buttons was too restrictive. A rule must not group and categorize; it must be specific. The rule in *Guzick* is faulty and in creating a basic rule, safeguards must be established to protect against flaws inherent in the *Guzick* rule.

37. 298 F. Supp. 238 (E.D.N.Y. 1969).
38. 335 F. Supp. 1164 (S.D. Tex. 1970).
39. *Id.* at 1166.
40. 425 F.2d 10 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970).

which gave the School Board the power "[t]o expel pupils guilty of gross disobedience or misconduct."[41] The court felt that application of this rule was an invasion of the students' constitutional rights.

> While recognizing the need of effective discipline in operating schools, the law requires that the school rules be related to the state interest in the production of well-trained intellects with constructive critical stances, lest students' imaginations, intellects and wills be unduly stifled or chilled.[42]

In *Schwartz* and *Graham* the theory that order must be maintained so as to accomplish the goals of education was upheld, but *Scoville* held that under the test of *Tinker*, the school board failed to show the substantial threat of disruption. *Schwartz* and *Graham* never applied the *Tinker* disruption test.

In *Zucker v. Panitz*,[43] Judge Metzner pointed out that if a school has a rule it must not use it arbitrarily, but universally. A group of students wished to publish in the school newspaper an advertisement opposing the Viet Nam War. The editor, Laura Zucker, approved the copy but was informed by Dr. Panitz, the principal, that the advertisement would be in violation of a school rule. The rule stated: [N]o advertising will be permitted which expresses a point of view on any subject not related to New Rochelle High School."[44] The judge showed that the school paper was open to editorials and letters concerned with outside matters and obviously a forum open to the free expression of ideas. Therefore, the rule failed because it was applied arbitrarily.

An action for relief against a school committee regulation was brought by Riseman in *Riseman v. School Committee of City of Quincy*.[45] The plaintiff sought permission to distribute literature of a political nature on the school grounds. The committee turned down Riseman's request because of the standing rule:

> Pupils, staff members, or the facilities of the school may not be used in any manner for advertising or promoting the interests of any community or non-school agency or organization without the approval of the School Committee. Exceptions to the above rule are:
> a. The Superintendent of Schools may cooperate in the many activities of the community providing such operation does not infringe on the school program or diminish the amount of time devoted to the school program.
> b. The Superintendent of Schools may authorize the use of films and materials or programs where the educational value

41. ILL. REV. STAT., ch. 122, § 10-22.6 (1967).
42. 425 F.2d at 14.
43. 299 F. Supp. 102 (S.D.N.Y. 1969).
44. *Id.* at 103.
45. 439 F.2d 148 (1st Cir. 1971).

> of the material considerably offsets any incidental advertising disadvantages.[46]

The court held that the committee was wrong in categorizing Riseman's leaflets as material described within the rule. The regulation failed because it was vague, overbroad, and did not reflect an effort to minimize the adverse effect of prior restraint.[47] The court also suggested that guidelines for distribution—time, place, and manner of distribution—should be instituted into the rules.

In Texas, a district court held that a restriction was overbroad. The case, *Sullivan v. Houston Independent School District*,[48] involved Dan Sullivan and Mike Fischer, who were seniors at Sharpstown High School. The school was new, and the students were dissatisfied with the administration. They printed an off-campus newspaper, *Pflashlyte*, in which they wrote of their discontent. The papers were not distributed on school grounds, and pupils were asked not to take the papers into the school. However, the newspaper did come to the attention of the school's principal, and the students were expelled. They asked the court to adjudge the rule under which they were expelled unconstitutional. The rule stated: "The school principal may make such rules and regulations that may be necessary in the administration of the school and in promoting its best interests. He may enforce obedience to any reasonable and lawful command."[49] The court criticized the vagueness of what was meant by "in promoting its best interests." After all, what type of evaluations may be made by this statement? "The high school too is changing and generalities can no longer serve as standards of behavior when the right to obtain an education hangs in the balance. This regulation is unconstitutional for both 'vagueness' and 'overbreadth' . . . ."[50] The court makes no issue of the fact that the students knew nothing of the rule prior to the incident.

Another federal district court (Maryland) again held that a rule was overly broad, in the recent case of *Baughman v. Freienmuth*.[51] The students had distributed literature, a "position paper", in violation of a Montgomery County regulation. They challenged the regulation on the grounds that the rule was unconstitutional and, therefore, violated their rights.

> Under the following procedures, student publications produced without school sponsorship may be distributed in schools:
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> * * * * * *

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46. *Id.* at 148–49 n.l.
47. *Id.* at 148.
48. 307 F. Supp. 1328 (S.D. Tex. 1969).
49. *Id.* at 1345.
50. *Id.* at 1346.
51. 343 F. Supp. 487,491 (D. Md. 1972).

> d). A copy must be given to the principal for his review. (He may require that the copy be given him up to three school days prior to its general distribution.) If, in the opinion of the principal, the publication contains *libelous* or *obscene language, advocates illegal actions, or is grossly insulting to any group or individual*, the principal shall notify the sponsors of the publication that its distribution must stop forthwith or may not be initiated, and state his reasons therefor. The principal may wish to establish a publications review board composed of staff, students, and parents to advise him in such matters.[52] (emphasis added)

The court held that, although the rule did not require a time limit for the principal's decision, simple rewording would correct this defect. However, the words, "advocates illegal action, or is grossly insulting to any group or individual" provide the fatal expression which renders the rule unconstitutionally vague.

> [I]n order to keep within the pale of permissive restraint, it appears that the guideline with respect to inflammatory material must keep fairly close to the 'forecast of disruption' language. . . . [T]he standards relating to advocacy of illegal action and gross insult seem to be too broad under prevailing notions of student rights.[53]

In *Baker v. Downey City Board of Education*[54] the issue of obscenity in an underground paper was discussed. Students are entitled to criticize and speak out on issues that they feel need comment; however, ". . .First Amendment rights to free speech do not require the suspension of decency in the expression of their views and ideas."[55] The students were not expelled because they spoke out against the administration, but because of the indecent manner of their expression. Though no definite school rule was broken, the rule of common decency was transcended. Therefore, the school did not fail in producing a valid rule, the students failed by abusing their rights.

The Second Circuit in *Eisner v. Stamford Board of Education*,[56] held the following policy rule concerning distribution of student publications to be invalid:

> Distribution of Printed or Written Matter:
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> The Board of Education desires to encourage freedom of

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52. *Id.* at 489.
53. *Id.* at 491.
54. 307 F. Supp. 517 (C.D. Cal. 1969).
55. *Id.* at 527.
56. 440 F.2d 803 (2d Cir. 1971).

> expression and creativity by its students subject to the following limitations:
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> No person shall distribute any printed or written matter on the grounds of any school or in any school building unless the distribution of such materials shall have prior approval by the school administration.
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> In granting or denying approval, the following guidelines shall apply:
>
> No material shall be distributed which, either by its content or by the manner of distribution itself, will interfere with the proper and orderly operation and discipline of the school, will cause violence or disorder, or will constitute an invasion of the rights of others.[57]

In *Eisner*, the court ruled that the above rule was neither vague nor overbroad but the court asked, ". . . to what extent and under what circumstance does the Board intend to permit school authorities to supress criticism of their own actions and policies?"[58] The Board in its policy failed to specify a definite brief period within which the review would be completed, by whom, and how the material would be submitted. Although the rule was not vague, the word "distribution" was. The court then noted that more than likely the Board intended "distribution" to refer to a "substantial distribution", but it failed to say this. The youths had wished to hand out a newspaper, and objected to the Board's rule making them request permission to publish an off-campus newspaper.

In *Eisner* the court felt that the Board's policy did not constitute an unconstitutional prior restraint upon the student. In addition the court said that the principal must not be burdened with numerous tasks, and therefore, ruled out the procedural safeguards of *Freedman v. Maryland*.[59] In *Freedman*, the court praised the procedural safeguards provided in *Kingsley Books, Inc. v. Brown*:[60]

> [S]ubdivision 2 . . . which provides that the persons sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial.'[61]

To guard against the hazards of prior restraint it might be advisable for the school board to institute a right of appeal for the student. An administrator is only a human and it's indeed probable that such a person may be sensitive to criticism. How can an administrator who is criticized fairly judge the reasonableness of a disputed commentary? An

57. *Id.* at 805.
58. *Id.* at 809.
59. 380 U.S. 51 (1965).
60. 354 U.S. 436 (1957).
61. *Id.* at 439.

appeal board would either reinforce the official or give the student another chance.

In another case, *Quarterman v. Byrd*,[62] the court adjudged the following rule to be a violation of student rights:

> 7. Each pupil is specifically prohibited from distributing, while under school jurisdiction, any advertisements, pamphlets, printed material, written material, announcements or other paraphernalia without the express permission of the principal of the school.[63]

The plaintiff was suspended for the infraction of Rule 7. The rule was found to be invalid because it did not discuss any criteria for the school official to employ in determining the permissibility of a written document. No mention is made of "substantial disruption" nor "sufficient interference with school activities." In each of the aforegoing cases something was amiss. Now, the remaining question is, can all of these cases that corrected school rules be compiled and synthesized into a constitutionally sound rule?

CONCLUSION

The atmosphere of a school is much different from that of society as a whole. The school has but a few hours each day to present to its students ideas and concepts, both complicated and involved. The students are young and easily distracted. Order must reign to maintain the proper decorum in which the student can learn. The rules at times may appear strict and overbearing, but the ever-present need for order must be controlling. If the rules are reasonable and necessary to aid in maintaining an educational atmosphere, then they are acceptable. Of course, a juvenile has the right to free expression. He may speak out on any issue, but he must not place in jeopardy his fellow students' right to an education.

A minor student is a citizen, but he is not entitled to the same rights and privileges as an adult. Just as society controls particular actions of the adult, the school society must control particular actions of the student.[64] Society makes specific demands on the adult. Schools likewise have their own set of demands for the student. Rules that will

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62. 453 F.2d at 59–60.
63. *Id.* at 55.
64. Baker v. Downey City Bd. of Educ., 307 F. Supp. 517, 527 (C.D. Cal. 1969). The court on this matter held: "The right to criticize and to dissent is protected to high school students but they may be more strictly curtailed in the mode of their expression and in other manners of conduct than college students or adults. The education process must be protected and educational programs properly administered."

balance both the student's right to free expression with the school's right to order are, accordingly, ideal.

Thus a student exists in a controlled environment, but the controls must not be so stringent that they stifle the creativity of the developing mind. The controls are necessary to achieve the school's goal of education. An inner struggle exists between the student's demand for free expression and the school's demand for order; it is truly a situation of expression versus education. On the one hand, there is the protection of the individual's freedom of expression; on the other, the overall objective of school districts to educate the multitude of students in their charge—one versus hundreds. A balance, therefore, must be found that will not hamper the mechanism of education, but yet must not arbitrarily nor totally muzzle the student's right.

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.[65]

The remaining task is to present a rule which is constitutionally valid and applicable to *all* school districts. The rule, to be valid, must be specific and contain precise steps of procedure. The rule must provide safeguards to protect the student's constitutional freedom.

> It is . . . essential that legislation aimed at protecting children from allegedly harmful expression . . . be clearly drawn and that the standards adopted be reasonably precise so that . . . those that administer [the law] will understand its meaning and application.[66]

The following is a model rule developed from review and analysis of the cases relevant to the subject of students' rights of expression.

> Rule 1.
>
> No person shall distribute more than 10 copies of any advertisements, pamphlets, announcements, booklets, leaflets, written material, printed material, nor other literary paraphernalia on the grounds of any school or school

65. Board of Educ. v. Barnette, 319 U.S. 624, 637 (1943).
66. People v. Kahan, 15 N.Y.2d 311, 313, 206 N.E.2d 333, 335, 258 N.Y.S.2d 391, 393 (1965).

building including the area immediately adjacent to the school, without prior permission by the principal.

To understand Rule 1 better, consider its formulation. In *Eisner*, Judge Kaufman questioned the use of the word "distribution." If the Board had meant a substantial distribution, they should have worded their rule in a more specific manner.[67] Because of this, Rule 1 specifically states what constitutes a substantial distribution—"more than 10 copies." The listing of the various forms of written or printed material is derived from the actual rule that existed for the Cumberland County schools in North Carolina as discussed in the *Quarterman* case. Because the rule covered all areas of written or printed material, it is adopted directly. The inclusion of the words "the area immediately adjacent to the school" comes from the holding in *Baker*. In this case the court held that the surrounding area was the school's responsibility.[68]

Rule 2.

A copy of material falling under Rule 1 must be left at the principal's office for his approval at least two school days prior to its general distribution.

As shown by *Eisner*, the school board rules should include time, place, and manner by which a student will submit his material for approval.[69] Justice Northrop, in *Baughman*, reiterated the need for set procedures for students to follow for approval:

> As to the details of the submission, it is clear that no particular method is mandated by the cases, but there should be a provision setting forth how may copies, where, and at what times, etc., the material is to be submitted for screening.[70]

Rule 3.

If the principal feels that the material contains libelous or obscene language, that the material would endanger the

67. 440 F.2d at 811. Judge Kaufman said:
> [W]e believe that the proscription against 'distributing' written or printed material without prior consent is unconstitutionally vague.... We assume, therefore, that the Board contemplates that it will require prior submission only when there is to be a *substantial* distribution of written material, so that it can reasonably be anticipated that in a significant number of instances there would be a likelihood that the distribution would disrupt school operations.

68. 307 F. Supp. at 526:
> [T]he fact the acts which resulted in the distribution on campus were not actually performed on campus is of no consequence. The school authorities are responsible for the morals of the students while going to and from school, as well as during the time they are on campus.

69. 440 F.2d at 810: "Although the Board's regulation passes muster as authorizing prior restraints, we believe it is constitutionally defective in its lack of procedure for prior *submission* by students for school administration approval, of written material before 'distribution.'"

70. 343 F. Supp. at 492.

> health or safety of the students, or that the material clearly threatens the substantial order of the school, he may find it unsuitable for distribution.

According to *Quarterman*, in order to have a valid rule, criteria must be established for the principal to follow when making his decision as to the suitability of the submitted material.[71]

The statement "contains libelous and obscene language" is taken directly from the Montgomery County regulation as shown in the *Baughman* case.

The wording "the material would endanger the health and safety of the students" is derived from the American Civil Liberties Union bulletin.[72] The bulletin further states that "[s]uch judgment, however, should never be exercised because of disapproval or disagreement with the article in question."[73]

The latter part of Rule 2 is based upon the *Tinker* test. The principal must consider what is involved and how it will affect his school. If he can fairly say that a disruption of the orderly atmosphere will occur, then he has substantial reason for disallowing the activity. In *Blackwell v. Issaquena County Board of Education*[74] the Fifth Circuit held that the evidence showed the wearing of "freedom buttons" caused a commotion, loud noise, and harassment; the school was disturbed; teaching was interrupted. Therefore, the regulation was reasonable. In contrast, *Tinker* held that the rule forbidding black armbands was not necessary. There was no possibility of disturbance, only an "apprehension of disturbance." In *Tinker*, the court said:

> In order . . . to justify prohibition of a particular expression of opinion, [the school] must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.[75]

Rule 4.

> Three school days after the copy has been left at the principal's office, the principal must inform the distributors of the eligibility or ineligibility of their document and he must give reasons for his decision. The principal's findings should be posted on a prominent bulletin board. Failure of

71. 453 F.2d at 59.
72. American Civil Liberties Union, *supra* note 34, at 12.
73. *Id.*
74. 363 F.2d 749 (5th Cir. 1966).
75. 393 U.S. at 509.

the principal to comply with this rule shall be deemed automatic approval of the matter in question.

This rule requires the principal to report his findings within a specific brief time. His decision must be made public so that no questions will be raised. In *Eisner* the school board was charged with failing to designate a specific time period within which the principal must determine the permissibility of the material.[76] Justice Northrop in *Baughman* also claimed that a rule to be valid must establish a time limit.[77] Therefore, based upon these two cases, a model rule must include procedures for the principal to follow.

The principal has a difficult task. What may appear to him to have an obvious potential danger of disrupting the educational environment may appear perfectly harmless to someone else. Thus, there is need for an appeal procedure.

Rule 5.

If the opinion of the principal is objectionable to the distributors, they may appeal his decision to a standing appeal panel. The panel will consist of the P.T.A. president, one teacher elected by the students at large, the president of the student council, one student elected annually by the students at large, one parent elected annually by the P.T.A., and one teacher selected by the principal.

Both *Eisner* and *Quarterman* call for an expeditious review procedure. The *Quarterman* court stated: "What is lacking in the present regulation, and what renders its attempt at prior restraint invalid, is the absence . . . of any procedural safeguards in the form of 'an expeditious review procedure' of the decision of the school authorities."[78]

Rule 6.

At the end of the appeal hearing, the panel will have one day in which to reach its decision. This decision will be posted for all interested parties to see. If a tie exists, the principal's decision will hold.

Since in *Eisner* and *Baughman* the courts held that the principal must reach his decision within a brief time, it seems appropriate to extend

76. 440 F.2d at 810: "The policy as presently written is wholly deficient in this respect for it prescribes no period of time in which school officials must decide whether or not to permit distribution."

77. 343 F. Supp. at 492: "The rule does not say when the principal must make his decision, but it appears to the Court that if the rule were re-worded to say the principal must make his decision as to allowance or disallowance of distribution within a brief time certain after submission of the material . . . this re-wording would cure the defect."

78. 453 F.2d at 59.

these decisions and apply them to the appeal board's decisions. If a definite time period is not established, then the board could postpone its decision and the relevance of the issue could be totally lost.

Rule 7.

If students wantonly defy the procedures set forth in these bylaws, they will subject themselves to suspension.

The wording of Rule 7 draws upon the holdings of *Schwartz*[79] and *Graham.*[80] As both cases showed, the court would not consider the constitutionality of the rules; the mere fact that students flaunted the rules was sufficient for the court. The model rule has established a precise procedure for students to follow. If students cannot abide by these regulations which are designed to protect their rights as well as the school environment, they leave the school no choice but to punish them for their abuse of authority. The consequences should be clear and known.

Thus the above represents a model rule which strives to preserve the educational process, but yet does not unreasonably restrict the students' right of expression. It is admittedly a heavy load for the principal, but as the head administrator of the school, it is part of his responsibility to balance the rights of the student with the needs of the school. Today's student is tomorrow's citizen who must carry forth the spirit of the Constitution. As James Madison said:

"Education is the true foundation of civil liberty."[81]

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APPENDIX

A MODEL RULE
(ANNOTATED IN *CONCLUSION, INFRA*)

Rule 1.

No person shall distribute more than 10 copies of any advertisements, pamphlets, announcements, booklets, leaflets, written material, printed material, nor other literary paraphernalia on the ground

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79. 298 F. Supp. at 242: "Gross disrespect and contempt for the officials of an educational institution may be justification not only for suspension but also for expulsion of a student."

80. 335 F. Supp. at 1166: "[G]ross disobedience of school disciplinarians [cannot] be tested against the disruption standard."

81. A somewhat thorough search was made to establish the authenticity of this statement. To date the only proof that James Madison ever said these words is an inscription on the facade of the James Madison High School in Brooklyn, New York. Mr. Rubin Kravitz, Head of the Social Studies Department of the school, has said that although no definite writing of Madison contains this quote, it encompasses Mr. Madison's "general approach to education"; perhaps some previous statement of Madison's was expanded upon when it came time to chisel the words into the wall of the school.

of any school or school building including the area immediately adjacent to the school, without prior permission by the principal.

Rule 2.

A copy of material falling under Rule 1 must be left at the principal's office for his approval at least two school days prior to its general distribution.

Rule 3.

If the principal feels that the material contains libelous or obscene language, that the material would endanger the health or safety of the students, or that the material clearly threatens the substantial order of the school, he may find it unsuitable for distribution.

Rule 4.

Three school days after the copy has been left at the principal's office the principal must inform the distributors of the eligibility or ineligibility of their document, and he must give reasons for his decisions. The principal's findings should be posted on a prominent bulletin board. Failure of the principal to comply with this rule shall be deemed automatic approval of the matter in question.

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